BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C

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| *In the Matter of:* | ) | MM DOCKET NO. 94-128 |
| | ) | |
| **Review of the Prime Time** | ) | |
| **Access Rule, Section 73.658(k) of the** | ) | |
| **Commission's Rules** | ) | |



To: The Commission



## COMMENTS OF THE FREEDOM OF EXPRESSION FOUNDATION, INC.

*Submitted by*

David M. Hunsaker, Esq.
Denise B. Moline, Esq.

**PUTBRESE & HUNSAKER**
6800 Fleetwood Rd., Suite 100
P.O. Box 539
McLean, Virginia 22101-0539

(703) 790-8400

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## SUMMARY

The Freedom of Expression Foundation ("FOE") submits that PTAR should be eliminated as inconsistent with the provisions of the First and Fifth Amendments to the United States Constitution in that it is an impermissible content-based regulation, that it no longer serves any valid governmental purpose, and that it unnecessarily intrudes on First Amendment rights. The Rule is invalid on its face, since the language of the Rule discriminates among sources of speech, and on the basis of the type of speech, and must been deemed to be a content-based regulation. Such regulation is forbidden under the First Amendment. Given the great multiplicity of video program outlets, and the past and continuing increase in types of video programming and technology allowing access to video programming, PTAR can no longer be justified under a lesser standard of scrutiny, pursuant to a scarcity rationale. Indeed, the scarcity rationale is an invalid basis under which to discriminate against speech, and in any event, scarcity no longer exists.

The Rule no longer serves the public interest, and unnecessarily skews the competitive balance between network stations and independent stations, and between network program providers and independent program suppliers. The purposes of the Rule, to encourage growth in programming sources, and to encourage local programming, have been achieved, whether by the Rule or through other means.

FOE respectfully submits that PTAR is now counterproductive to effective competition among program suppliers, and that it places significant, unjustifiable

barriers to the exercise of First Amendment rights of television station licensees to choose what programming to broadcast. It unlawfully infringes upon the First Amendment rights of network program suppliers in distribution of their program product. The Rule no longer serves any significant governmental interest in increasing competition in program providers, and diversity of program voices in the industry. Continued regulation is thus no longer warranted. Accordingly, for the reasons specified herein, FOE urges the Commission to repeal the Prime Time Access Rule.

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C

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|---|---|---|
| ***In the Matter of:*** | ) | **MM DOCKET NO. 94-123** |
| | ) | |
| **Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules** | ) | |

To: The Commission

## COMMENTS OF THE FREEDOM OF EXPRESSION FOUNDATION, INC.

FREEDOM OF EXPRESSION FOUNDATION, INC. ("FOE"), by Counsel, and pursuant to Section 1.415 of the Commission's Rules,[1] and Paragraph 5 of the Commission's *Order Granting Extension of Time for Filing Comments and Reply Comments*[2] in the above-captioned proceeding, hereby respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making*[3] ("*NPRM*") in the instant proceeding in support of elimination of the Prime Time Access Rule 47 C.F.R. §658(k) ("PTAR").

Specifically, FOE submits that PTAR should be eliminated as inconsistent with the provisions of the First and Fifth amendments to the United States Constitution in that it is an impermissible content-based regulation, that it no longer serves any valid governmental purpose, and that it unnecessarily intrudes on First Amendment rights. Given the multiplicity of video program outlets, and the increased diversity in types of video programming and methods of access to video programming, PTAR can no longer be justified under a diversity or scarcity

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[1]47 C.F.R. §1.415.

[2]DA 94-1408 (Released December 8, 1994).

[3]FCC 94-266, (Released October 25, 1994).

rationale. The Rule no longer serves the public interest, and unnecessarily skews the competitive balance between network stations and independent stations, and between network program providers and independent program suppliers. One of the main purposes of the Rule, to encourage local programming, has been effectively circumvented. FOE respectfully submits that PTAR is now counterproductive to effective competition among program suppliers, that it places significant, unjustifiable barriers to the exercise of First Amendment rights of television station licensees to choose what programming to broadcast, and that it unlawfully infringes upon the First Amendment rights of network program suppliers in distribution of their program product. Nor does the Rule presently serve any significant governmental interest in increasing competition in program providers, and diversity of program voices in the industry. Continued regulation is thus no longer warranted. Accordingly, for the reasons specified herein, FOE urges the Commission to repeal the quarter century-old PTAR.

## *STATEMENT OF INTEREST*

1. FOE is a private nonprofit membership corporation which seeks, through research and educational programs, to preserve and advance the First Amendment rights of the mass media, particularly the electronic mass media, and the freedom of the press, both print and electronic, from governmental intrusion in the editorial process and the dissemination of information by the press to the public. FOE's members and contributors include private foundations, publishers of daily newspapers, broadcast licensees, cable MSO's and program suppliers, trade associations for broadcasters and newspapers, regional telephone companies, and other corporate entities which generally support the research and educational objections of FOE.

2. FOE has participated in numerous Commission proceedings in the past, with a view toward assisting the Commission to develop a full and complete record concerning the First Amendment implications of public policy alternatives. Vast changes in the communications industry during the past two decades have resulted in a substantial increase in the number and in the diversity of communications outlets, and in information available to the public. As the Commission has recognized in the instant *NPRM*, these significant changes require, at a minimum, a concomitant reevaluation by the FCC of its protectionist policies. First Amendment considerations also require that the FCC revise, relax or eliminate any protectionist policy that impinges on First Amendment rights when circumstances and changes in the industry so warrant.

3. FOE has a direct interest in the development and maintenance of a competitive, open-market system of diverse delivery of television programming, and supports the adoption of policies by the Commission that promote diversity through elimination of artificial government-imposed restrictions that control the ownership of video communications entities, or which inhibit the full and robust exercise of freedom of expression by these entities.

## *DISCUSSION*

## I. PTAR IS CONSTITUTIONALLY INVALID ON ITS FACE

### *A. History and Purpose of the Rule*

4. The Prime Time Access Rule, 47 C.F.R. §73.658(k) provides that commercial television stations owned or affiliated with a national television network in the 50 largest television markets may devote no more than three of the four prime time viewing hours to presentation of programs from a national network, or programs formerly on a national network, other than feature films. The Rule provides additional exceptions for certain types of programs, irrespective of

their source: runovers of live sporting events, special news, documentary and children's programming, and sports and network programming of a special nature, which are not counted toward the 3-hour limitation. The Rule, adopted in 1970, was not promulgated in response to any statute, but rather in response to growing concerns expressed by program suppliers that the three major networks, ABC, CBS and NBC, dominated the program production market, and inhibited the development of competing program sources. The FCC in adopting the Rule did so primarily to foster competition in the video programming market. Additionally, the rule was adopted in order to foster broadcast of local programming, which the FCC believed that broadcasters would obtain and produce during the access period.[4]

### *B. The Rule Impermissibly Discriminates as to both the Source and the Type of Speech.*

5. On its face, PTAR limits the presentation of network-produced programming or speech on network affiliated stations to a specific period of time during the prime time hours in certain (*i.e.*, the Top 50) markets. However, it allows network affiliates in other markets to program all four prime time hours, and does not restrict programming on non-affiliated stations.

6. At present, PTAR also effectively discriminates among networks. It presently applies only to the three "major" networks, and excludes new and emerging networks such as Fox, Warner and Paramount because of the definition of "network" in the rule. Thus, the rule discriminates among speakers of the

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[4]*Report and Order* in Docket No. 12781, 23 FCC 2d 382, 18 RR 2d 1825 (1970) ("*PTAR I*"); *modified, Report and Order* in Docket No. 19622, 50 FCC 2d 829 (1975) ("*PTAR III*"); in the interim between *PTAR I* and *PTAR III*, the Commission issued a decision substantially revising *PTAR I*. *Report and Order*, Docket No. 19622, 44 FCC 2d 1081 (1974) ("*PTAR II*"). However, *PTAR II* never became effective, and was abandoned by the Commission in favor of *PTAR III*.

same or similar class, based upon the amount of time programmed by the network.

7. On its face, then, the regulation discriminates between networks, between network affiliate stations and nonaffiliates, and among network affiliate stations depending on their location. PTAR discriminates among programs based on the *source* of the program, and, because of the specified exceptions in the regulations, it also discriminates among programs based on the *content* of the program.

8. The regulation thus favors certain speakers over others and certain types of speech over others: it favors speech by non-network producers, and sports and non-entertainment speech over entertainment speech. The regulation is clearly premised on the identity of the speaker, and the content of the speech.

### *C. Content-Based Regulation of Speech is Subject to the Highest Level of Scrutiny.*

9. The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST., AMEND. I. At the core of the First Amendment proscription against governmental interference with speech is the "principle that each person must decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal."[5] Governmental restrictions on speech because of the content of the message, or which favor particular messages, contravene this ideal, and pose the risk that government may manipulate the public debate through coercion, rather than through persuasion.[6]

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[5]*Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 75 RR 2d 609, 615 (1994), *citing Leathers v. Medlock*, 499 U.S. 439, 449 (1991) and *Cohen v. California*, 403 U.S. 15, 24 (1971).

[6]*Id., citing Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991).

Thus, the First Amendment may not countenance governmental control over content of messages expressed by individuals or entities, and the courts apply exacting scrutiny to statutes and regulations that suppress, disadvantage or impose differential burdens on speech because of its content.[7] Under that strict scrutiny test, a law or regulation which is seen to be content-based will be presumed invalid, unless some *compelling governmental interest* in the regulation can be demonstrated, which overrides, in the interests of the public, the individual interest in freedom of expression.

10. Analysis of PTAR reveals that it does not meet the standard of strict scrutiny required for content-based regulation. It is recognized that the Commission through PTAR is not regulating programming as a result of any agreement or disagreement with the messages conveyed in that programming; such regulation, of course, is absolutely prohibited. *Turner Broadcasting System, Inc. v. FCC, supra*, 114 S. Ct. at 2459. However, PTAR nevertheless regulates all *entertainment* speech during prime time hours in large markets, and particularly during the access period. Under *Turner* the rule is deemed to be a content-based regulation, subject to the highest level of constitutional scrutiny under the First Amendment.[8] "The First Amendment's hostility to content-based regulation

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[7] *Id.*

[8] The 4th Circuit Court in *Chesapeake and Potomac Telephone Co. of Virginia v United States*, 76 RR 2d 986 (4th Cir. 1994) (hereinafter, "*C&P Telephone*") in citing *Consolidated Edison*, construed the Supreme Court's references to "message" in *Turner* to refer not only to the particular side of an issue, but also to any idea or topic upon which the speech might comment, regardless of the position of viewpoint taken. Similarly, the Court in *C&P Telephone* believed that the *Turner* Court's references to regulations of "format" were similarly intended to refer to regulations of modes of speech likely to convey particular viewpoints or to engage discussion on topics in a particular way, (e.g., entertainment programming, news programming, or political programming) and were thus deemed to be *content-based* regulations.

extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537 (1980).

*1. The Turner Analysis*

11. Making the initial determination whether a regulation is content-based or content-neutral is not always simple. Where, as here, the regulation is a "time" regulation, and is restricted to certain markets, and limits only a small portion of the broadcast day, much depends on the circumstances in which the regulation operates. In *Turner*, the Supreme Court outlined a two-step inquiry in order to determine whether a regulation is or is not content-neutral. First, the plain terms of the regulation must be examined to see whether, on its face, the regulation confers benefits or imposes burdens based on the *content* of the speech regulated;[9] second, it must be determined, even if the regulation's plain language does not mandate a finding of content discrimination, whether there are nevertheless indications that the rule's manifest *purpose* is to regulate speech based on the *message* it conveys.[10]

12. As demonstrated above, the plain language of PTAR, which carves out exceptions for certain types of programming or formats of programming, and exempts them from the burdens otherwise imposed by the rule, confers benefits and imposes burdens based on the *content* of the speech regulated. Under *Turner*, therefore, the regulation must be deemed to be *content-based*, and the strict scrutiny standard must be applied.

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[9]*Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. at 2459, 2460.

[10]*Id.* 114 S. Ct. at 2461. Nor will the assertion of a content-neutral purpose be sufficient to save a regulation which, on its face, discriminates based on content. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231-232 (1987).

13. Additionally, since the rule discriminates against entertainment programming by certain networks, it discriminates against *speakers* within the same medium. The *Turner* Court reaffirmed that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."[11] Regulation which restricts the speech of some elements of society in order to enhance the relative voice of others is presumed invalid. *Buckley v. Valeo*, 424 U.S. 1 (1976). Such discrimination constitutes an indication that the rule's purpose is to regulate the message provided by certain speakers, and is highly suspect. The fact that the restrictions operate against only a small group of speakers is irrelevant.[12] The discrimination is especially obvious given the fact that there are now three additional operating networks, Fox, United Paramount Network and the WB Network, one of which approaches the status of a major network, in competition with the original three networks for program time, and which supply programming to their affiliates, none of whom are subject to the PTAR restrictions.[13]

14. PTAR also operates to decrease the net amount of programming available to the public. This result is yet another basis for characterizing PTAR as an impermissible content-based restriction on free speech. A regulation that decreases the amount of available speech may operate as a content-based regulation because, by limiting the amount of available speech, the likelihood that some

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[11]*Id.* 114 S. Ct. at 2468.

[12]*C&P Telephone*, 76 RR 2d at 995.

[13]Cf. *NPRM*, at ¶17. *See also Broadcasting & Cable*, "New Players Get Ready to Roll", Jan. 2, 1995, p. 30; "UPN Beats Everybody", Jan. 23, 1995, p. 4. the WB Network was launched January 11, 1995, and UPN was launched January 16 and 17, 1995.

point of view or discussion on a particular topic may not occur is enhanced.[14] PTAR certainly removes from available programming during the access period programming produced by the three major networks, and thus decreases the amount of available programming from which broadcasters, and ultimately the public, may choose. This result is yet another indication that the regulation is impermissible. Thus, PTAR falls under the level of scrutiny applicable to content-based regulation.

15. PTAR fails to pass either of the content analysis tests set forth in *Turner* and is therefore invalid on its face as an impermissible content-based restriction on speech. Accordingly, it should be repealed.

*2. A Lesser Standard of Scrutiny for PTAR is Inappropriate.*

16. In *C&P Telephone, supra*, the 4th Circuit Court of Appeals identified the level of scrutiny applied in the *Mt. Mansfield* and *Red Lion* cases[15] as a "minimum level" of scrutiny, generally applied by the courts in First Amendment cases involving regulation of the *broadcast* media. The constitutional theory supposedly warranting a reduced level of scrutiny was based upon the scarcity rationale. While it is arguable that PTAR constitutes regulation of the broadcast media only,[16] and that only a minimal level of scrutiny should be applied in testing the constitutionality of the regulation, the fact of the development, since

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[14]*C&P Telephone*, 76 RR 2d at 995.

[15]*Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Mt. Mansfield Television v. FCC*, 442 F.2d 470, 21 RR 2d 2087 (2d Cir. 1971).

[16]This was certainly true at the time the rule was promulgated in 1970, since the cable industry was in its infancy, and other methods of delivery of video programming were not yet developed.

1970, of numerous other non-broadcast video program delivery outlets[17] introduces a factor which has eviscerated the scarcity rationale, and which renders a minimal scrutiny level inappropriate.

17. However applicable the minimal scrutiny analysis may have been in the past, it should not be applied now, where the scope of the analysis concerning the objectives, goals and impact of PTAR necessarily extends beyond the broadcast industry into non-broadcast program supply and delivery methods. As noted in detail below, video programming is supplied to consumers not only by commercial and non-commercial broadcast television stations, but by cable TV, wireless cable, SMATV, Direct Broadcast Satellites and low power television.[18]

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[17]See ¶¶ 23 - 24, below.

[18]The Commission has recently authorized the development and initiation of Video Dialtone platforms by regional telephone companies. On February 7, 1995, the Common Carrier Bureau granted the application of BellSouth Telecommunications, Inc. for a technical and market trial of video dialtone service outside Atlanta, Georgia. *News Release*, Report No. CC-95-14 (February 7, 1995). In 1994, the Commission granted the application of Southern New England Telephone Co. (SNET) to conduct a video dialtone in the West Hartford. SNET has recently filed for a one-year extension of its authorization. *Public Notice*, DA 95-174 (February 7, 1995). Bell Atlantic - Virginia, Inc. filed, on January 24, 1995, a notification of its intent to conduct a video dialtone market trial in Northern Virginia, and has been authorized to conduct video dialtone market trials elsewhere. *Public Notice*, DA 95-138, CC Docket No. 88-616 (February 1, 1995). That company has also formed a new subsidiary, Bell Atlantic Video Services, Inc. which will participate in the video dialtone trials as a programmer which will select, package, price and produce its own video programming. *Id.* In order to accommodate the numerous requests for video dialtone market trials, the Common Carrier Bureau has adopted procedures to expedite the review process for tariff filings proposing regulations and rates applicable to market trials for video dialtone service. *Public Notice*, DA 95-144 (February 2, 1995)

## II. PTAR CAN NO LONGER PASS CONSTITUTIONAL MUSTER UNDER AN INTERMEDIATE SCRUTINY TEST.

18. Assuming, *arguendo*, that PTAR can be viewed as content-neutral regulation, and thus subject to some lesser standard of scrutiny, FOE submits that PTAR does not pass scrutiny under either an *intermediate* or even a *minimal* level of scrutiny, and must be deemed violative of the First Amendment.

19. The Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same form of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . .

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*U.S. v. O'Brien*, 391 U.S. 367, 367 (1968).

20. At the time PTAR was promulgated, it was found to pass constitutional muster by the 2d Circuit Court in *Mt. Mansfield Television, Inc. v. FCC, supra.* That court reviewed the regulation under the "significant governmental interest" standard, and relied heavily on the studies and proceedings at the Commission which supported the agency's promulgation of the rule, and which demonstrated that increasing network monopoly of program production had resulted in a decrease of available program suppliers and available programs by 1970. The court there found PTAR to be a reasonable restriction designed to serve a significant governmental interest, citing *Red Lion Broadcasting, Inc. v. FCC, supra.*

### *A. PTAR No Longer Serves a Valid Government Purpose*

21. It has been observed that scarcity is an inappropriate basis for broadcast regulation of First Amendment speech.[19] Even assuming that scarcity should serve as a standard for government oversight, it is well established that the scarcity rationale no longer exists. The Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions.[20] Television broadcasters and network program suppliers no longer enjoy the monopoly on video programming they once had, and there is simply no basis for imposing continued regulation that would ordinarily be deemed violative of First Amendment principles.

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[19]In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 61 RR 2d, 330, *reh. denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), the court noted that use of the scarcity rationale as an analytic tool in connection with new technologies inevitably leads to strained reasoning and artificial results.

> "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." (footnotes omitted)

61 RR 2d at 337.

[20]*See, e.g., Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984), *recon.*, 100 FCC 2d 74 (1985) (revising the seven-station rule to permit ownership of up to twelve stations); *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272 (1987), *recon.*, 3 FCC Rcd 2035 (1988), *aff'd. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (eliminating the fairness doctrine as unnecessary because of the diversity of voices and opinion in broadcast and other media).

22. Even assuming, *arguendo*, that the PTAR restrictions were reasonable restrictions on speech under the circumstances which existed in 1970 when PTAR was first promulgated,[21] and served an important governmental interest, that is, promoting diversity of programming voices in the industry, the Rule no longer serves that purpose. At present, and as demonstrated herein, there is no valid rationale for imposing any further restriction on any program supplier from distributing programming during prime time hours, and on restricting the choices of stations in this regard.

23. Since PTAR was adopted in 1970, the total number of commercial and non-commercial full service television stations has increased 76 percent; the number of commercial independent stations which have traditionally relied upon syndicated programming has grown by nearly 450 percent. The percentage of independent stations in the top 50 markets has grown from 1.3 percent to 5.8 percent per market, on average. And despite the increase in the number of commercial stations generally, the total number of network affiliates has remained largely unchanged. Seventy percent of all television households now receive 11 or more over-the-air channels. Even without considering the increase in other competitive media outlets, it is clear that the number of competing broadcast stations in the markets subject to PTAR has increased substantially; moreover, the number of outlets and the number of TV programs being shown to the average household has also increased substantially since 1970.[22]

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[21] *See Mt. Mansfield Television v. FCC, supra.*

[22] All the foregoing facts were cited in the *NPRM* at ¶16.

24. As noted above, three additional new and emerging networks exist, none of which are subject to PTAR, and which provide restricted programming to their affiliate stations during the prime time period. Additionally, the Commission must consider significant developments in other video distribution services since the 1970's, including the evolution of cable TV, which has grown from 17.5 percent U.S. household penetration in 1975 to 62.5 percent penetration today. Cable subscribers nationally receive an average of 39 channels.[23] Other video services, such as wireless cable, SMATV and low power television are fast becoming viable video delivery services, competitive with broadcast television and cable TV. Home satellite receivers and VCR cassette recorders are also available in many homes, and provide an alternative means of delivery for video programming. Newer technologies, such as Direct Broadcast Satellite service ("DBS") are now operational and have the capacity to transmit a significant number of video channels direct to the U.S. household from satellite transmitters.[24] As a result of the explosion in video outlets, there has been a huge growth in demand for, and delivery of, new syndicated and other first-run programming. Consequently, the overall dominance of the three major networks has declined significantly, in both audience share and advertising revenue

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[23]*NPRM*, ¶18. As noted by the Commission, cable service is potentially available to nearly all U.S. households. *Id.*

[24]*NPRM*, ¶19. DirecTV and United States Satellite Broadcasting ("USSB") have capacity for 216 and 20 channels, respectively, and DBS is marketed in over 41 states. Primestar, a DBS service owned and operated by six cable owners has been operational since 1991. *Id.*

share.[25] Competition is expected to increase, with video dialtone service provided by telephone companies, wireless cable services, and the newer DBS service.[26]

25. Clearly, the objectives of PTAR have been achieved, largely as a result of the growth in the industry of alternative video outlet sources. The existence of numerous alternative program supply sources,[27] and the significant reduction of the major networks' dominance as program suppliers undermines the governmental interest in regulation which serves as the constitutional basis for PTAR under the "intermediate" level of scrutiny identified in *C&P Telephone*.[28]

### *B. PTAR Must be Eliminated as Unconstitutional*

26. If the justification supporting PTAR at the time of its promulgation, or even at the time it was judged constitutionally sound in *Mt. Mansfield, supra*, is no longer valid, then the Commission should eliminate the rule as no longer necessary to achieve the governmental interest it was designed to achieve. Even

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[25]The networks' share of prime time viewing audience declined from 91% to 61%; their collective all-day viewing audience share dropped from 66% in 1985 - 86 to 53% in 1992-93. The networks' advertising share declined from 44% to 31% nationally.

[26]*NPRM*, ¶21.

[27]The Comments of the Coalition to Enhance Diversity notwithstanding, it is obvious that a greater number of program suppliers exist than was the case when PTAR was promulgated, and that the competition among them appears to be formidable. See, NPRM, at ¶25, and fn. 61; *see also* Comments of the Coalition to Enhance Diversity, at p. 11-12. The Coalition also mentioned other viable independent program producers, as well as network program suppliers, all of whom presumably are viable program suppliers. Coalition Comments at p. 3-4. Moreover, assuming the dominance of certain of the first run syndicators during the access hour, it would seem desirable to introduce the network program supply back into the access period, if only to counteract such program dominance.

[28]76 RR 2d at 991.

statutes depending for validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. *See Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). "[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) *cert. denied*, 434 U.S. 829 (1977). Given that the facts cited above lead to the inescapable conclusion that PTAR is no longer necessary to ensure a diversity of programming sources for video programming, it is clear that PTAR is no longer necessary to promote the originally stated goal. At present, PTAR is not supported by any important governmental interest, and must be deemed unconstitutional. Accordingly, the Rule must be repealed.

27. To pass the lesser levels of scrutiny applicable to content-neutral regulation, such regulation must also be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (*citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also, U.S. v. O'Brien, supra.* Even assuming that there is some continued governmental interest in promoting additional increased diversity of program voices, or in guarding against renewed monopoly of programming sources,[29] it cannot be concluded that PTAR, or even a relaxed version of the Rule is essential to that interest or can be constitutionally sustained. Given the

[29] *Cf.*, the Commission's discussion of the dominance of three program suppliers, King World, Paramount and Fox, which account for 95 percent of the programs acquired for a broadcast during the access period in the top 50 markets. *NPRM*, ¶25.

level of available video programming in the broadcast industry, and the numerous alternative methods of access to similar and alternative video programming now available to the public, the most extensive regulation that could reasonably be imposed would be a reporting requirement, to enable the government to monitor program production, supply, distribution and access, in order to ensure that there is no post-PTAR decrease in the availability and diversity of programming and programming sources, and no regression toward monopoly or dominance on the part of any given program provider or providers. Under current circumstances, PTAR is unnecessarily intrusive on First Amendment rights. Program diversity can be achieved by simply permitting marketplace forces to naturally regulate supply and demand for programming in the present, enormously expanded video market.

## CONCLUSION

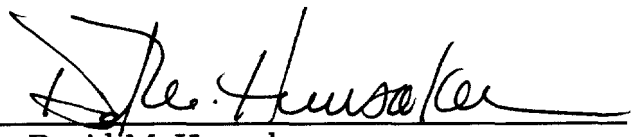
28. In the present circumstances, and given the current video marketplace, the Commission must find that PTAR is unconstitutional as a content-based regulation that lacks any compelling governmental interest to support continued enforcement of the Rule. On its face, the Rule discriminates between types of programming, speakers, and burdens the rights of certain speakers to provide programming at certain times and in certain locations. In the alternative, and assuming that PTAR is determined to be content-neutral, the Commission must nevertheless find that there no longer exists any important governmental interest to support continued implementation of the Rule. It makes little difference whether PTAR itself has resulted in the evolution of an increased number of program suppliers, or whether the technological developments of the

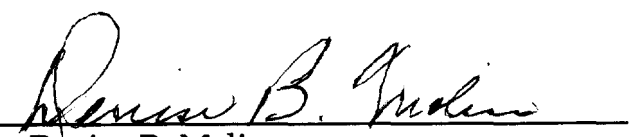
last two decades resulting in numerous types of outlets for video programming has created a demand that can be met only by new program suppliers; there is now a large diversity of program suppliers providing programming to a variety of video outlets, resulting in a greater diversity of network and non-network programming available to the public. The goal of PTAR has been achieved. There is no longer any scarcity of program supply. Continued promulgation of the Rule is no longer necessary to achieve its stated objective. Since PTAR has significant First Amendment implications, continued enforcement can no longer be justified under any rationale, and the Rule must be eliminated.

WHEREFORE, the foregoing considered, FOE respectfully urges that the Commission AMEND its rules to REPEAL the Prime Time Access Rule.

Respectfully submitted,

**FREEDOM OF EXPRESSION FOUNDATION, INC.**

By: 
David M. Hunsaker

By: 
Denise B. Moline

Its Attorneys

March 6, 1995

*Law Offices*
**PUTBRESE & HUNSAKER**
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101
(703) 790-8400